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IN UNITED STATES

SUPREME COURT

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RALPH W. JACKMAN, Trustee of the Estate of John H. Young, a Bankrupt,

Defendant in Error

vs.

EAU CLAIRE NATIONAL BANK,

Plaintiff in Error

On Writ of Error to the Supreme Court of the State of Wisconsin

BRIEF OF DEFENDANT IN ERROR ON MOTION TO DISMISS WRIT

W. P. BARTLETT,
C. T. BUNDY and
R. P. WILCOX,
Attorneys for Defendant in Error.

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NATURE OF ACTION.

This was an action brought by defendant in error against the plaintiff in error under Sec. 60 b, Bank-Act, 1898, to recover property, or the value thereof, which was transferred by the bankrupt to plaintiff in error, for the purpose of giving it a preference over other creditors, which preference was received by the plaintiff in error with knowledge that such transfer was made for the purpose of giving it such preference.

HISTORY OF ACTION.

This action was commenced by the trustee in the Circuit Court of Eau Claire County, prior to the amendment of Feb. 5, 1903, giving Federal Court jurisdiction of such action, and resulted in a judgment in

favor of the trustee and against the bank for $6,843.77, damages and costs. (p. 26 record). On appeal to the Supreme Court of the State of Wisconsin this judgment was affirmed. (See mandate in record). This writ of error is brought to reverse such judgment of the Supreme Court of the State of Wisconsin.

ISSUES MADE BY PLEADINGS.

The complaint of the Trustee alleged in substance, that on June 7th, 1902, the bankrupt Young filed his petition in the bankruptcy court for the Western District of Wisconsin, and was on that day adjudged a bankrupt; that the Trustee qualified as required by law; that within four months immediately preceding the filing of the petition, the bankrupt was in possession of certain lumber, shingles and lath, located at Cadott, and certain other logs located on the Yellow River, spoken of as the up-river logs, the value of all of which amounted to $35,000; that on February 10th, 1902, the bankrupt was wholly insolvent, which fact was known to the plaintiff in error; that on that day the bankrupt was indebted to the bank in the sum of $27,000; that on February 10th, 1902, while insolvent, the bankrupt executed to the plaintiff in error a chattel mortgage on certain sawlogs, to secure a note of $15,900, and on the same day executed a second chattel mortgage to plaintiff in error, transferring certain lumber, lath and shingles as security to a second note of $11,100; that the indebtedness evidenced by said notes accrued long prior to that date; that the property so transferred constituted substantially all of the property owned by the bankrupt; that the effect of the enforcement and foreclosure of said mortgages will be to enable the plaintiff in error to obtain a much larger percentage

of its debt than will the other creditors of said Young in the same class as plaintiff in error; that said mortgages were given by the bankrupt and received by plaintiff in error for the purpose of hindering and delaying the other creditors of the bankrupt, and that at the time they were received, the plaintiff in error had reasonable cause to believe that the same were given with the intention of giving it a preference, and that the plaintiff in error well knew that such mortgages were executed for the sole purpose of giving such preference.

The complaint further alleges that the Waters-Clark Lumber Company was a corporation, whose president was a director of the bank; that after the execution of said mortgages and on or about March 10th, 1902, the cashier of the bank requested the bankrupt to transfer the mortgaged property to the Waters-Clark Lumber Company, and that such transfer was made on March 10th, 1902, pursuant to such request; that such transfer was made by absolute bill of sale of all of the property mentioned in the chattel mortgages, together with other saw-logs, known as the up-river logs; that immediately thereafter the Waters-Clark Lumber Company, acting pursuant to the directions of the defendant bank, took possession of all the property and sold the same and applied the proceeds to the payment of the indebtedness secured by said mortgages; that at the time of making said bills of sale, the Waters-Clark Lumber Company and the defendant bank, their officers and agents, knew that the property so transferred constituted all of the available assets of said Young, and that as a result the other creditors would lose all of their indebtedness; that no consideration was paid by said Waters-Clark

Lumber Company to said Young for the property so transferred; that by reason of the collusive arrangement and agreement aforesaid, and by means of the said two chattel mortgages and bills of sale, the defendant bank, within four months prior to June 7th, 1902, appropriated to the payment of its indebtedness, substantially all of the property of the bankrupt, which property was worth the sum of $35,000; that there was no other property in the possession of plaintiff as Trustee, out of which the other creditors of Young can be paid, and that it is necessary, to enable defendant in error to pay anything to the other creditors, to recover from said defendant bank the value of the property so by it appropriated by means of said transfers. (p. 1-10 Record).

The defendant by answer admits the filing of the petition, and the appointment and qualification of plaintiff as trustee; admits the execution of the two mortgages of February 10th; admits that the president of the Waters-Clark Lumber Company was a director of the defendant bank; admits that in March, 1902, the bankrupt sold to the Waters-Clark Lumber Company certain logs covered by one of said mortgages, and certain other logs, and admits that a portion of the proceeds of said sale was paid to the defendant bank to discharge valid and existing liens it held against the property.

The answer further alleges that the mortgages were given for a good and valuable consideration, and alleges that neither of the mortgages, nor the payments made to the defendant bank, were made, given or received for the purpose of giving it a preference over other creditors of Young, contrary to the provisions of the bankruptcy act. (p. 11-12 Record).

VERDICT OF JURY.

The jury by special verdict found:

FIRST. That on February 20th, when the mortgages were given, on March 3rd, when a bill of sale was given to the Waters-Clark Lumber Company for the lumber, and again on March 29th, 1902, when the bill of sale was given to the Lumber Company for the logs, the property of Young, at a fair valuation, was not sufficient in amount to pay his debts.

SECOND: That Waters-Clark Lumber Company acted for the bank and pursuant to an arrangement between it, the bank, and the bankrupt, in taking legal title to the lumber and logs in question.

THIRD: That it was the intention of the bankrupt, by executing the chattel mortgages, transferring the lumber and transferring the logs by bill of sale, to give to the plaintiff in error a preference.

FOURTH: That at the time of accepting the chattel mortgages and at the time of causing the lumber and logs to be transferred to the Waters-Clark Lumber Company, the plaintiff in error and its officers and agents, had reasonable cause to believe that the bankrupt intended by such transfers to give it a preference. (See verdict, pp. 14-17 Record.)

By stipulation the value of the property was left for the court to fix, and such values were not submitted to the jury. The court made findings, fixing values, upon which the judgment was entered. (See Findings, p. 20 Record).

JUDGMENT.

The judgment entered by the Circuit Court in Wisconsin and affirmed by the Supreme Court, was for the net amount realized by plaintiff in error from the proceeds of the logs and lumber in question, after

paying time orders or time checks for amounts due to laborers, which under the Wisconsin statute might or would have become liens by filing the proper petition. The plaintiff in error held most of these time checks.

AUTHORITIES.

To give the supreme court jurisdiction it must appear by the record that a federal question is involved.

Zadig vs. Baldwin, 166 U. S. 485.

Citizens Bank vs. Owensboro, 173 U. S. 636.

Dewey vs. Des Moines, 173 U. S. 193, 198.

Oxley Stove Company vs. Butler County, 166 U. S. 648, 654.

In Oxley Stove Co. vs. Butler County, supra, the court said that the words "specially set up or claimed" in section 709 of the Revised statutes "were inserted in order that the revisory power of the supreme court should not extend to rights denied by the final judgment of the highest court of a state unless the party claiming such rights plainly and distinctly indicated, before the state court disposed of the case, that they were claimed under the constitution, treaties or statutes of the United States. The words 'specially set up or claimed' imply that if a party intends to invoke for the protection of his rights, the constitution of the United States or some treaty, statute commission or authority of the United States he must so declare; and unless he does so declare 'specially,' that is, unmistakably this court is without authority to reexamine the final judgment of the state court. This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a federal right is left to mere inference. * * Upon like grounds the jurisdiction

of this court to reexamine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a federal right." The writ of error was dismissed.

In Dewey vs. Des Moines, supra, the court said: "Although no particular form of words is necessary to be used in order that the Federal question may be said to be involved, within the meaning of the cases on this subject, there yet must be something in the case before the state court which at least would call its attention to the Federal question as one that was relied on by the party, and then, if the decision of the court, while not noticing the question, was such that the judgment was by its necessary effect a denial of the right claimed or referred to, it would be sufficient. *It must appear from the record that the right set up or claimed was denied by the judgment or that such was its necessary effect in law.*"

In order to bring a case from the state court to the United States Supreme Court for review, it is necessary that the record should show that the point giving jurisdiction was raised and decided in the court below.

Detroit City Railway Co. vs. Guthard, 114 U. S. 133.

Bolln vs. Nebraska, 176 U. S. 83, 91.

Loeber vs. Schroeder, 149 U. S. 580.

Miller vs. Texas, 153 U. S. 535.

Choteau vs. Gibson, 111 U. S. 200.

Hagar vs. California, 154 U. S. 639.

In Choteau vs. Gibson, supra, the court said: "From the beginning it has been held that, to give us

jurisdiction in this class of cases, it must appear affirmatively on the face of the record, not only that a federal question was raised and presented to the highest court of the state for decision, but that it was decided or that its decision was necessary to the judgment or decree rendered in the case."

In Detroit City Railway Co. vs. Guthard, supra, the court said: "the reason of the rule is obvious. Our jurisdiction for the review of a judgment of the highest court of a state depends on the decision by that court of one or more of the questions specified in section 709 Revised Statutes and in the way there mentioned. If there has been no such decision in the suit there can be no reexamination of the judgment here. It is what was actually decided that we are to consider, not what might have been decided; and, as our jurisdiction must appear affirmatively on the face of the record before we can proceed, the record must show either in express terms or by fair implication, not only the question but its decision. It is not enough to find by searching after judgment, that the requisite question might have been raised and presented for decision. It must appear that is was actually raised and actually decided." Motion to dismiss was granted.

In Hagar vs. California, supra, the court held that error will not lie to a state court unless a federal question was actually raised and decided or necessarily involved in the judgment. It is not enough that a federal question might have been raised.

Where it does not appear in any part of the record that any federal question was actually presented for consideration, or in any way relied on, in the state court, before the final judgment from which

the writ of error, has been taken, the fact that, after the final judgment and in the petition for a writ of error, a federal question was presented, will not give the supreme court jurisdiction and the writ will be dismissed.

Johnson vs. New York Life Insurance Co., 187 U. S. 491.

Simmermann vs. Nebraska, 116 U. S. 54.

In Johnson vs. New York Life Insurance Co., supra, the court said: "Conceding that it was unnecessary to set it up in any pleading anterior to the trial since it could not be claimed that the right had been denied to her until the trial took place, it was clearly her duty to make the claim either on the motion for a new trial, or in the assignments of error filed in the supreme court of the state. In neither does it appear, nor is there any allusion to it in the opinion of the supreme court. It first appears in the petition for a writ of error from this court. This is clearly insufficient."

A federal question cannot be raised for the first time by a petition for rehearing after judgment in the highest court of the state, so as to bring the case within the appellate jurisdiction of the United States supreme court.

Capital National Bank vs. First National Bank, 172 U. S. 425.

Miller vs. Cincinnati R. Co. 168 U. S. 131.

Sayward vs. Denny 158 U. S. 180.

Loeber vs. Schroeder 149 U. S. 580.

In Loeber vs. Schroeder, the court said: "It is also well settled by the decisions of this court that the attempt to raise for the first time a Federal question, in a petition for rehearing after judgment comes

too late."

To give the supreme court jurisdiction it must appear that the plaintiff in error set up and claimed some right privilege or immunity under a federal statute, and that such right privilege, or immunity was denied by the judgment of the state court sought to be reviewed.

Home for Incurables vs. City New York, 187 U. S. 155.

Dewey vs. Des Moines, 173 U. S. 193, 200.

Sayward vs. Denny, 158 U. S. 180.

Smith vs. Adsit, 16 Wall 185.

Farney vs. Towle, 1 Black 262.

In Sayward vs. Denny, supra, the court said: "As the validity of no treaty or statute of, or authority exercised under, the United States, nor of a statute of, or authority exercised under, any state, was drawn in question, it is essential to the maintenance of our jurisdiction that it should appear that some title right, privilege or immunity under the constitution or laws of the United States was specially set up or claimed in the state court, and that the decision of highest court of the state, in which such decision could be had, was against the title, right, privilege or immunity so set up or claimed."

In Dewey vs. Des Moines, supra, the court said: "In order to be available in this court some claim or right must have been asserted in the court below by which it would appear that the party asserting the right founded it in some degree upon the constitution or laws or treaties of the United States. In such case, if the court below denied the right claimed it would be enough; or if it did not in terms deny such right, if the necessary effect of its judgment was to

deny it, then it would be enough. But the denial whether express or implied, must be of some right or claim founded upon the constitution or the laws or treaties of the United States which had in some manner been brought to the attention of the court below. A claim or right which has never been made or asserted cannot be said to have been denied by a judgment which does not refer to it. A point that was never raised cannot be said to have been decided adversely to a party, who never set it up or in any way alluded to it. Nor can it be said that the necessary effect in law of a judgment, which is silent upon the question, is the denial of a claim or right which might have been involved therein, but which in fact was never in any way set up or spoken of."

The title, right, privilege or immunity claimed must be personal to the plaintiff in error. He is not entitled to review where the title, right, privilege or immunity was asserted by the other party, and the decision was in favor of that party and adverse to himself.

De Lamar's Nevada Gold Mining Co. vs. Nesbitt, 177 U. S. 523.

Texas & Pacific Ry. Co. vs. Johnson, 151 U. S. 81.

Kizer vs. Texarkana & Fort Smith Ry. Co. 179 U. S. 199.

Missouri vs. Adriano, 138 U. S. 496.

In Missouri vs. Adriano, supra, the court said: "Here is clearly a right or privilege claimed by respondent under a statute of the United States within the meaning of revised statutes section 709, and had the judgment of the Supreme Court of Missouri been adverse to his claim, there could be no doubt of his right to a writ of error from this court to review its

ruling. It is insisted, however, that the relator has no right to a review of the ruling in favor of respondent, as he claimed no right or privilege, personal to himself, or to his own status as a citizen, from such statute. The question thus presented is, whether the right or privilege must necessarily be personal to the plaintiff in error, or whether he is not entitled to a review where such right or privilege is asserted by his opponent, and the decision is in favor of such opponent and adverse to himself. While there is some force in the argument that the right of review in cases involving the construction of a federal statute, should be mutual, the act limits such right to cases where the state court has decided against the title, right, privilege or immunity set up or claimed under the statute."

In Kizer vs. Texarkana & Fort Smith Ry. Co., supra, the court said: "He now says that, although he set up no claim of any title, right, privilege or immunity, under the act of Congress, yet the claim which defendant specially set up under it was acknowledged and enforced by the state court, and the statute was thus construed unfavorably as to him, and that he has, therefore, a right to have the judgment of the state court, which was based on such construction, reviewed here, under section 709 of the Revised Statutes of the United States. But that section provides, so far as here applicable, that when any right, title, privilege or immunity is claimed under a statute of the United States, and the decision of the state court is against the title, right, etc., specially set up or claimed under such statute, then and in such case the judgment of the state court may be reviewed by this court.

Here, the claim under the federal statute has been allowed by the state court, and the contract sued on by the plaintiff in error has been denied validity because of its violation of that statute. It is not every case where a federal statute has been construed by a state court that gives a right of review to this court, but the claim of any right, title, privilege or immunity under the statute must have been denied by the state tribunal in order to give us jurisdiction to review its judgment. That a federal statute was construed unfavorably to one of the parties to the suit is no ground for jurisdiction by this court, unless such construction was not only unfavorable, but was against the right, title, etc., specially set up and claimed under the statute. In that case the party setting up and claiming the right under the statute, which has been denied, can obtain a review here. Thus it might happen, as it has happened in this case, that, while the decision upon the construction of the statute was unfavorable to the maintenance of the cause of action set forth by the plaintiff in error, it was not against, but in favor of, the claim made under the federal statute."

Mere questions of fact present no federal question and the findings of the jury are verities in this court.

Smiley vs. Kansas, 196 U. S. 447.

Kaufman vs. Tredway, 195 U. S. 271.

Dower vs. Richards, 151 U. S. 658.

Western Union vs. Call Publishing Co., 181 U. S. 92.

In Smiley vs. Kansas, the court said: "The verdict of the jury settles all questions of fact."

In Dower vs. Richards the court said: "That this

court, in an action at law, at least, has no jurisdiction to review the decision of the highest court of a state upon a pure question of fact, although a federal question would or would not be presented according to the way in which the question of fact was decided, is clearly settled * * *"

In Kaufman vs. Tredway 196 U. S. 447, the court held that whether a bankrupt was insolvent at the time of giving the alleged preference, and whether the creditor had reasonable cause to believe that it was intended thereby to give a preference are questions of fact as to which the supreme court of the United States is concluded by the verdict of the jury in a suit by the trustee to recover the amount of the preference.

In Thompson vs. Fairbanks 196 U. S. 516, 523, the court said: "The question whether any conveyance, etc., was, in fact, made with intent to defraud creditors, when passed upon in the state court, is not one of a federal nature."

In McKenna vs. Simpson 129 U. S. 506, an assignee in bankruptcy brought an action in a state court to set aside a conveyance made by the bankrupt, as made to defraud creditors. The court held that when he resorted to that court and no question was raised as to his power under the acts of congress or the rights vested in him as assignee, the proceedings were governed and the judgment of the court upon the validity of the conveyances was subject to review, in the same manner and to the same extent, as proceedings of a similar character by a creditor to set aside conveyances in fraud of his rights by a debtor. In the proceedings of the state court no decision was made against the validity of any statute of, or

authority exercised under the United States, or against any right, title, privilege, or immunity claimed under the constitution of the United States or any statute thereof.

ARGUMENT.

No federal question was presented by the pleadings or passed upon by the trial court or the Supreme Court of the State of Wisconsin in rendering the judgment, to reverse which the writ of error has been issued. Neither in defendant's pleadings in the trial court nor briefs in the Supreme Court, was any right, privilege or immunity under a federal statute specifically set up or claimed. The only questions presented by the peadings in the trial court, were: First, Did the bankrupt give to plaintiff in error a preference? and, Second, Did plaintiff in error accept such preference with reasonable ground to believe that it was intended as such? There were the two questions litigated in the trial court and passed upon by the jury. The action was brought by the plaintiff and defendant in error, claiming a right under the bankruptcy act of 1898, namely, the right to recover certain property which had been transferred to plaintiff in error within four months of the adjudication and received by it with reasonable cause to believe that such transfer was intended as a preference. The Wisconsin court enforced such right. The defendant and plaintiff in error made no claim under any federal statute, but simply took issue with the facts alleged in the complaint. If this court were to assume jurisdiction, it would be for the sole purpose of passing upon the questions which were submitted to the jury, to determine as to whether or not the jury had properly performed its duty, and as to whether or not

the trial court had properly instructed on the law. The record presents nothing but a question of fact, and we respectfully submit that the writ of error should be dismissed.

W. P. BARTLETT,
C. T. BUNDY and
R. P. WILCOX,
Attorneys for Defendant in Error.